

# International Commercial Dispute Resolution

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## I. Introduction

At the outset of any arbitral proceeding, there are several critical ethical questions that confront parties and prospective party-appointed arbitrators. What is the status of the prospective party-appointed arbitrator: neutral or partisan? What interests and relationships must the prospective arbitrator disclose? What communications are permitted between a party and a prospective party-appointed arbitrator? Once appointed, what communications, if any, are permitted between an arbitrator and the party who appointed him?

The answers to all of these questions have dramatically changed in the United States by virtue of the approval by the American Arbitration Association and the American Bar Association of the 2004 Revision to the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, effective March 1, 2004 (2004 Revision).<sup>1</sup> The 2004 Revision replaced the 1977 Code of Ethics for Arbitrators in Commercial Disputes (1977 Code).<sup>2</sup> This was a watershed event brought about in large measure by the persistent efforts of the Section of International Law. By applying a presumption of neutrality to all arbitrators, with con-

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1. The Code of Ethics for Arbitrators in Commercial Disputes, *available at* [http://www.abanet.org/dispute/commercial\\_disputes.pdf](http://www.abanet.org/dispute/commercial_disputes.pdf). The American Arbitration Association implemented the principal concepts of the 2004 Revision by amendments to its Commercial Rules, effective July 1, 2003.

2. *Id.*

comitant guidelines on disclosure and communications, the 2004 Revision brings the American ethics requirements substantially in line with international norms.

The 2004 Revision addresses three principal topics: bias, disclosure, and communications.

#### A. BIAS

The most fundamental and far-reaching change contained in the 2004 Revision is the application of the presumption of neutrality to all arbitrators, including party-appointed arbitrators. By contrast, the 1977 Code applied a presumption of nonneutrality to party-appointed arbitrators. The 2004 Revision reverses this presumption and establishes instead a presumption of neutrality for all arbitrators. The concept of neutrality embodied in the 2004 Revision encompasses both independence and impartiality.

Notwithstanding the presumption of neutrality, parties in certain domestic arbitrations in the United States may continue to prefer that their party-appointed arbitrations be non-neutral. The 2004 Revision permits party-appointed arbitrators to act as nonneutrals, but only when it is shown that "all parties" expect that the two arbitrators appointed by the parties may be "predisposed" toward the party appointing them.<sup>3</sup> The 2004 Revision refers to arbitrators who are determined to be nonneutral as "Canon X arbitrators" because Canon X establishes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standards of neutrality.<sup>4</sup> These provisions permit the continuation of the domestic practice historically applied in some types of tripartite arbitrations in the United States. Canon X arbitrators are expected to observe all the other ethical obligations prescribed by the 2004 Revision, except those from which they are specifically excused by Canon X.

In order to avoid any doubt about the status of party-appointed arbitrators, all party-appointed arbitrators have a duty at the outset of the proceeding to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutrals or as Canon X arbitrators. In the event of doubt or uncertainty, the party-appointed arbitrators should serve as neutrals until any uncertainty is resolved. This ethical requirement is new. A party-appointed arbitrator has an obligation to ascertain his or her status as early as possible, but not later than the first meeting of the arbitrators and parties and provide a timely report to the parties and other arbitrators.<sup>5</sup>

#### B. DISCLOSURE OF INTERESTS AND RELATIONSHIPS

The 2004 Revision subjects all arbitrators, including Canon X arbitrators, to the same obligations: disclose any interests or relationships likely to affect impartiality or which might create an appearance of partiality.<sup>6</sup> The duty of disclosure encompasses any known interests or existing or past relationships. The 2004 Revision applies a new standard for disclosure, casting the duty in terms of those existing or past financial, business, professional or personal relationships that might reasonably affect impartiality or lack of independence in the eyes of any of the parties.<sup>7</sup> Prospective arbitrators are required to make a reasonable effort to

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3. *Id.* at canon IX.B.

4. *Id.*

5. *Id.* at canon IX.C.

6. *Id.* at canon X.B.

7. *Id.* at canon II.A.

inform themselves of relevant interests or relationships; any doubt is to be resolved in favor of disclosure.<sup>8</sup>

### C. COMMUNICATIONS WITH THE PARTIES AND THE OTHER ARBITRATORS

The 2004 Revision expands and clarifies the guidelines on permissible communications between arbitrators and the parties and establishes new guidelines on communications between party-appointed arbitrators and the chair of the tribunal in tripartite arbitrations.<sup>9</sup> The 2004 Revision, unlike the 1977 Code, includes the subjects that a prospective arbitrator may discuss with any party in the absence of the other party, concerning potential appointment as an arbitrator. The discussion may include the identities of the parties, counsel, or witnesses; the general nature of the case; and inquiries about the arbitrator's suitability or availability for the appointment. Discussion of the merits of the case is specifically prohibited.<sup>10</sup> In addition, each party-appointed arbitrator may consult with the party who appointed the arbitrator about the arbitrator's neutrality in connection with the discharge of the arbitrator's duty to ascertain and disclose the arbitrator's status.<sup>11</sup> The 2004 Revision also permits arbitrators to discuss with the party who appointed them about the selection of the third arbitrator.<sup>12</sup>

If they have disclosed the intention to engage in such communications, the 2004 Revision permits Canon X arbitrators to communicate with their appointed parties concerning "any other aspect of the case," subject to enumerated exceptions.<sup>13</sup> If such communications occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, Canon X arbitrators are required, at or before the first hearing or meeting, to disclose the fact of such communication. Moreover, the 2004 Revision imposes new restrictions that apply to communications between Canon X arbitrators and the neutral arbitrator.<sup>14</sup> These provisions reflect a fundamental reform designed to preserve the impartiality and independence of the neutral chair of the arbitral tribunal in tripartite arbitration proceedings in which the two party-appointed arbitrators are acting as nonneutrals.

## II. Award Enforcement Under the New York Convention

Two federal appeals courts have recently issued rulings relating to award enforcement under the New York Convention—one authorizing the enforcement of an arbitral award against a sovereign government and the other allowing only one signatory state primary jurisdiction over an arbitral award. The Second Circuit ruled, in a case of first impression, that under federal common law and international law, a foreign arbitration award can be confirmed against a sovereign nation where the arbitration award was signed by that nation's government and where the government, but not the nation itself, participated in the arbi-

8. *Id.* at canon II.B. and D.

9. *Id.* at canon II, III.

10. *Id.* at canon III.B(1).

11. *Id.* at canon III.B.(4).

12. *Id.* at canon III.B.(3) and (4).

13. *Id.* at canon X.C.(2).

14. *Id.* at canon X.

tration proceedings.<sup>15</sup> Plaintiff Compagnie Noga D'Importation et D'Exportation S.A. (Noga) contracted with the Government of the Russian Federation (Government) and subsequently brought an arbitration naming the Russian Federation as respondent. The Government, rather than the Russian Federation, appeared in the arbitration, and ultimately Noga prevailed and sought confirmation of the award in the United States against the Russian Federation. The district court denied confirmation of the award on the ground that the Russian Federation was not a proper party to the action because it was not party to the arbitration.

The Second Circuit vacated the district court order, holding that the arbitration award entered against the Government was enforceable against the Russian Federation. The majority decision held that under either Russian law, federal common law, or international law, the Government and the Russian Federation should be treated as the same party in the confirmation proceeding. Under its federal common law analysis, the court analogized this case to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* and Eleventh Amendment immunity, stating that "no meaningful legal distinction can be drawn between a sovereign and one of its political organs."<sup>16</sup> Therefore the Government and the Russian Federation could not be treated as separate parties. Under international law, similarly, the court held that "the conduct of any State organ shall be considered an act of that State under international law."<sup>17</sup> The court concluded that "regardless of whether principles of Russian law, federal common law, or international law are applied, the Russian Federation and the Government are not separate 'parties' for the purposes of confirming and enforcing an arbitral award under the [New York] Convention."<sup>18</sup>

The Fifth Circuit recently held that, under the New York Convention, only one primary jurisdiction over an arbitral award exists with respect to a particular case, notwithstanding some disagreement among scholars.<sup>19</sup> In *Karaha Bodes Co.*, the Fifth Circuit affirmed the enforcement of an arbitration award made in Switzerland. The Supreme Court of Switzerland had dismissed the defendant's suit to annul the award, and in parallel proceedings, the award had been annulled in Indonesia. The court noted that under the New York Convention, the country in which the arbitration award is made has primary jurisdiction over the arbitration award, while other signatory states have secondary jurisdiction over the award. "Only a court in a country with primary jurisdiction over an arbitral award may annul that award. . . . [A] court in a country with secondary jurisdiction is limited to deciding whether the award may be enforced in that country."<sup>20</sup> The court noted further that the courts of primary jurisdictions have far broader discretion to set aside awards than do courts of secondary jurisdictions.<sup>21</sup>

The defendant in this case argued that both Switzerland and Indonesia had primary jurisdiction because Switzerland was the site of the arbitration, and according to the defen-

15. *Compagnie Noga D'Importation et D'Exportation S.A. v. The Russian Fed'n*, 361 F.3d 676 (2d Cir. 2004).

16. *Id.* at 688.

17. *Id.* at 689 (citation omitted).

18. *Id.* at 690.

19. *Karaha Bodes Co. L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004).

20. *Id.* at 287 (footnotes omitted).

21. *Id.* at 288.

dant, Indonesian law governed the disputed contracts. The court noted that while “[t]he New York Convention suggests the potential for more than one country of primary jurisdiction . . . the predominant view is that the Convention permits only one in any given case.”<sup>22</sup> The court held that “[s]uch ‘exclusive’ primary jurisdiction in the courts of a single country is consistent with the New York Convention’s purpose; facilitates the ‘orderliness and predictability’ necessary to international commercial agreements; and implements the parties’ choice of a neutral forum.”<sup>23</sup> The court concluded that Switzerland was the sole primary jurisdiction; therefore, the lower court properly ruled that the Indonesian court’s annulment of the arbitration award is not a defense to enforcement under the New York Convention. The Fifth Circuit’s decision is consistent with the Convention’s purpose to “encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”<sup>24</sup>

### III. Motion Practice in Arbitration

Relative speed is one of the claimed advantages of arbitration over litigation, at least in U.S. courts, leading to another claimed advantage: cost savings. Several factors that protract civil trials are absent in arbitration. There are fewer motions, there is less discovery, and hearings are held without interruption.<sup>25</sup> After selection of arbitrators and acceptance of assignments, the arbitrators can concentrate solely on the controversy that the parties have set before them. A drawback of the lack of motions practice in arbitration is the relative absence of provisions to which litigators are accustomed for expediting and managing cases, such as motions to dismiss and motions for summary judgment. The general view has been that summary judgment is unavailable in arbitration and, perhaps, would be inconsistent with giving a party the chance to present its evidence.<sup>26</sup> One leading authority notes, however, “a trend toward increased judicialized procedural rules and greater reliance on strict legal arguments, and one can anticipate that motions practice may enjoy wider currency in the future.”<sup>27</sup>

Examples of judicialized arbitration rules that encourage the use of prehearing motions practice may be found in the recently revised Commercial Arbitration Rules and International Arbitration Rules of the American Arbitration Association (AAA). The Commercial Arbitration Rules now provide that

[t]he arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and *direct the parties to focus their presentations* on issues the decision of which could dispose of all or part of the case.<sup>28</sup>

22. *Id.*

23. *Id.* at 309.

24. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

25. John H. Henn, *Where Should You Litigate Your Business Dispute? In an Arbitration? Or Through the Courts*, 59 DISP. RESOL. J. 34 (2004).

26. Gary W. Born, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY & MATERIALS 81 (1994).

27. *Id.*

28. American Arbitration Association, Commercial Arbitration R. and Mediation P. 30(b) (amended 2003), available at <http://www.adr.org/sp.asp?id=22440> (emphasis added).

Similarly, the AAA International Commercial Rules now provide that "[t]he Tribunal may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, and *direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.*"<sup>29</sup>

Both sets of rules (1) require the arbitrator to conduct proceedings with a view toward expediting resolution of the dispute; (2) grant discretion as to how this might be done; and (3) empower the arbitrator to order (direct) the parties to focus on dispositive issues. Relying on the arbitrator's duty, discretion, and power, a party in arbitration under the AAA rules may fashion the equivalent of a motion to dismiss or a motion for summary judgment.

Overseas Private Investment Corporation (OPIC) has always included AAA arbitration clauses in its insurance contracts. Its experience offers some good examples of the use of motion practice in arbitration. OPIC has paid over 90 percent of its claims but, since 1971, has been party to thirteen arbitrations arising from denial of insurance claims. In most cases, hearings were held. In some cases, the hearings were bifurcated to resolve the issue of whether events had occurred that fell within the scope of coverage before putting the parties to the expense of determining the amount of compensation payable. One case was resolved on the equivalent of a motion to dismiss, as the demand for arbitration was filed after the one-year limit in the insurance contract and the arbitrator ruled that it was time-barred.

OPIC's experience illustrates that it has always been possible for a party to take the initiative to expedite an arbitration or avoid unnecessary expense by focusing on determinative issues and postponing consideration of issues that may be made irrelevant. The significance of the revised rules is that they give such initiatives an explicit institutional endorsement and empower the arbitrator to impose them, if necessary, upon a party who is determined to engage in delaying tactics to increase the cost of arbitration and thereby compel settlement.<sup>30</sup>

In a recent case, OPIC used the new AAA rules to dispose of an arbitration relating to an insurance claim without a hearing and, to a substantial degree, only upon documents that the parties had already prepared in connection with the underlying claim.<sup>31</sup> The potential dispositive issues included (1) the failure to file for arbitration within the contractually specified one-year period, (2) the absence of insurance coverage during the period when the events of recovery allegedly occurred, (3) failure (for years) to provide notice of the alleged events of recovery, and (4) failure to maintain the financial statements required

29. American Arbitration Association, International Dispute Resolution P. art. 16 (2003), available at <http://www.adr.org/sp.asp?id=22090> (emphasis added).

30. Earlier AAA rules assumed that there would be an evidentiary hearing. Although they allowed the arbitrator "to ask for statements clarifying the issues involved" and "the discretion to vary [the] procedure," they required the arbitrator "to afford a full and equal opportunity to all parties for the presentation of any material and relevant evidence." Commercial Arbitration R. and Mediation P.: Order of Proceedings and Communication with Arbitrator (Revised Rules and Fees for Cases filed on or after May 1, 1992), AAA. Similarly, the AAA International Rules (as Amended and Effective on May 1, 1992), article 21, Hearings, assumed there would be hearings. An arbitrator who decided that no evidence would be material and held a hearing on a dispositive motion would be acting within the rules but perhaps against the expectations of at least one party and the administrator.

31. *Buchheit Int'l Ltd. v. Overseas Private Inv. Corp.*, AAA Case No. 50 T 195 00361 03 (2004). The case was conducted pursuant to the AAA Commercial Rules and the AAA Supplementary Procedures for International Commercial Arbitration.

to determine compensation. A procedural conference was held at which OPIC indicated its intent to file a motion under Rule 30(b) requesting dismissal of all claims on the grounds that the undisputed documentation in the record fully disposed of them. The arbitrator established a schedule for OPIC's briefing in support of its motion for summary judgment. The claimant was afforded ample time to respond in writing and participated in telephonic conferences with the arbitrator and opposing counsel. The arbitrator convened a telephone conference, during which he reviewed the procedural posture of the case and requested clarification as to certain matters. Each party agreed that no reasoned award was required for a favorable decision on the motion and that witness testimony was unnecessary to decide the motion. Having heard both sides on the motion, the arbitrator issued a decision in OPIC's favor about three weeks later. There is no doubt that avoidance of evidentiary hearings spared the parties considerable time and expense.

The rules of other arbitration institutions may also contain official support for some type of a motions practice. For example, article 14 of the Rules of the London Court of International Arbitration (adopted to take effect for arbitrations commencing on or after 1 January 1998) (LCIA Rules) permits the parties to adopt procedures to avoid unnecessary delay or expense and provide a fair and efficient means for the final resolution of their dispute.<sup>32</sup> Article 14, however, falls short of a mandate to the arbitrator, lacking the power to back it up.<sup>33</sup>

Like the AAA rules before the recent revisions, the LCIA Rules include provisions that counsel could use to persuade a tribunal that it had the power to entertain at least partial motions to dismiss or for summary judgment. The tribunal "may in advance of any hearing submit to the parties a list of questions which it wishes them to answer with special attention."<sup>34</sup> The tribunal also has the power, on the application of any party or on its own motion, after giving the parties a reasonable opportunity to state their views, to take the initiative in identifying the issues and ascertaining the relevant facts, laws, and rules applicable to the merits of the dispute.<sup>35</sup> This joint formulation, by the tribunal and parties, of the issues and law could accomplish the equivalent of what the AAA Rules now explicitly provide.

In any system of arbitration that grants parties autonomy, it should be possible to develop procedures to reach a decision through efficient but fair procedures, including some equivalent of a prehearing motions practice. Both the AAA and LCIA are making progress toward that goal.

#### IV. OPIC's Salvage Efforts

In 2004, the United States Government filed a request for arbitration against the Government of India.<sup>36</sup> On September 3, 2003, the AAA's International Centre for Dispute

32. London Court of International Arbitration (LCIA), Arbitration Rules (1998) [hereinafter LCIA Rules].

33. *Id.* art. 14.

34. LCIA Rules, *supra* note 32, art. 19.3.

35. *Id.* art. 22.1.

36. Request for Arbitration by the United States & India, Nov. 4, 1997, available at <http://www.opic.gov/foia/awards/GOI110804.pdf> [hereinafter Request for Arbitration]. The United States Government was the moving party filing the Request for Arbitration in this matter. The Overseas Private Investment Corporation (OPIC) is a U.S. Government agency that supports U.S. investment in overseas developmental projects through

Resolution transmitted to the Overseas Private Investment Corporation (OPIC) the arbitration panel's Findings of Fact, Conclusions of Law, and Award in the insurance claim arbitration that was filed by subsidiaries of Bechtel and GE (Claimants) at the end of 2002.<sup>37</sup> The panel concluded that a total expropriation of Claimants' investment occurred.<sup>38</sup> Further, the panel excused the Claimants from the requirements that Claimants' foreign enterprises receive arbitral awards in their favor from both the Government of India (GOI) and the Indian state government where the investment was located, the award be affirmed by the Indian Supreme Court, and the Transfer Amount under the PPA be due and owing before OPIC would be required to pay compensation to the Claimants for their losses of the insured investment.<sup>39</sup> In response, OPIC paid Claimants in full, and, subsequently, paid certain other related insurance claims. The total amount paid to all insured parties as a result of the GOI expropriation was in excess of US \$110 million.<sup>40</sup>

Both the payment of these insurance claims and the direct loan losses suffered by OPIC, due to violations of international law, entitled the United States to seek salvage from the GOI pursuant to the Investment Incentive Agreement between the Government of the United States and the Government of India executed on November 19, 1997 (GOI Agreement).<sup>41</sup> Unlike the typical bilateral investment treaty (BIT) that protects the investor, an Investment Incentive Agreement protects OPIC.<sup>42</sup> Investment Incentive Agreements were originally approved through the Department of State's (DOS) Circular 175 process.<sup>43</sup> They are typically between the United States government and the host government, negotiated by OPIC, and signed on behalf of the United States by the U.S. Ambassador, Secretary of State, or, in some cases, President of OPIC. In general terms, these agreements provide for operation of OPIC's programs in foreign countries, recognition of OPIC's rights as trans-

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loans, loan guarantees, and political risk insurance. OPIC has specific authority to settle and arbitrate insurance claims, to sue in its own name, and to represent itself in all legal and arbitral proceedings. See Foreign Assistance Act of 1961, as amended, 22 USC § 32. OPIC has a Board of Directors that currently includes board members from the private sector and six United States government agencies, including the Department of State.

37. *Bechtel Enterprises Int'l Ltd. vs. Overseas Private Inv. Corp.*, AAA Case No. 50 T195 00509 02 (2003), available at <http://www.opic.gov/foia/Awards/2294171-1.pdf>. The panel's findings are subject to FOIA.

38. *Id.* at 24. The Claimants' insurance contracts were generally similar to most OPIC insurance contracts, and both contained a provision setting forth four elements that must be satisfied before compensation for total expropriation would be paid by OPIC. That provision provided for payment if host government acts leading to the expropriation were a) attributable to a foreign government authority in the part of the country where the project was located, b) violations of international law or material breaches of local law, c) acts that directly deprived the investor of fundamental rights in the insured investment, and d) acts that continued for a period of six months.

39. *Id.* at 24-26. The Panel found that an injunction issued by the Indian courts "rendered compliance" by Claimants to be, at the very least, impracticable, if not impossible, without violating the terms of the court's injunction." *Id.* at 28.

40. *Id.* at 30-31.

41. Indian Embassy, *India and US sign Investment Incentive Agreement* (Nov. 19, 1997), available at <http://www.indianembassy.org/indusrel/iaia11997.htm>.

42. See Foreign Assistance Act of 1961, § 237 (codified as amended at 22 U.S.C. § 2197 (2004)). It requires the president of the United States to institute OPIC programs there, and OPIC to determine suitable arrangements with host governments to protect its interests. Over 150 Investment Incentive Agreements are in effect to date, providing a framework for protection of OPIC operations in those countries.

43. See U.S. DEPARTMENT OF STATE, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS*, 11 FOREIGN AFFAIRS MANUAL 720, (Washington, D.C., revised February 25, 1985), available at <http://foia.state.gov/REGS/Search.asp> (last viewed July 4, 2005). Circular 175 outlines general requirements for negotiation, signature and registration of treaties and other international agreements.



feree, assignee, and subrogee, and international arbitration between governments if disputes arise that cannot be settled by negotiation. The GOI Agreement follows the approved format in most respects.<sup>44</sup>

In late 2004, at the request of OPIC's management and with the approval of OPIC's Board of Directors and concurrence from the Department of State, a Request for Arbitration against the GOI was filed. In approving of the filing against the GOI, OPIC's Board of Directors recognized that OPIC is directed by the Foreign Assistance Act "... to undertake to conduct [its] ... operations on a self-sustaining basis."<sup>45</sup> As a result, OPIC's fiduciary duty to United States taxpayers requires it to seek salvage.<sup>46</sup> The Request was to the GOI through the U.S. Embassy in New Delhi, India on November 8, 2004.<sup>47</sup> The Request states that through the unlawful actions of the GOI and its instrumentalities, the GOI is responsible, under established principles of international law, for the losses relating to the Dahbol project (Project).<sup>48</sup> Specifically, the Request holds the GOI responsible for repudiation of contractual obligations for non-commercial reasons, denial of justice, and expropriation of OPIC's interests in the Project.

Phase I of the Dahbol power plant, which operated from to May 1999 to early 2001, is currently in mothballs awaiting a potential restart.<sup>49</sup> Since 2001, there have been various attempts by parties to commercially restructure the project, as well as, settle claims including those of OPIC.<sup>50</sup> An arbitral panel is currently being selected in the OPIC arbitration. Meanwhile, mothballed generators and other equipment on site in India unfortunately remain unused.

## V. Reviving the U.S. Bilateral Investment Treaty Program

On October 25, 2004, the United States and Uruguay signed a bilateral investment treaty (BIT),<sup>51</sup> signaling a revival of the U.S. BIT program. A BIT is intended to protect and encourage investment by investors of one country in the territory of the other country. BITs endeavor to mitigate the risks associated with investing abroad by providing investors with significant investment protections and access to international arbitration. On a mac-

44. See article 6(c) of the GOI Agreement. Article 6 generally addresses dispute resolution and dictates the formation of a three person arbitral tribunal. The GOI Agreement, as well as all other Investment Incentive Agreements, provide for the tribunal to determine its own procedures and do not specify use of a particular service provider or set of arbitral rules. All Investment Incentive Agreements are subject to FOIA and are posted on OPIC's public website.

45. Federal Assistance Act of 1961, § 231 (codified as amended at 22 U.S.C. § 2191(a) (2004)).

46. Interestingly, in more than 30 years of OPIC operation, arbitration under an Investment Incentive Agreement has never been requested. In all other cases where OPIC paid an investor's claim, salvage was obtained from the host government in question through diplomatic means.

47. Request for Arbitration, *supra* note 36.

48. *Id.* Total losses to the project's investors and lenders total more than \$2 billion. OPIC's losses amount to more than \$110 million paid on political risk policies and more than \$190 million in worthless, non-performing loans.

49. *Id.* The Project was built in two phases. The first phase was a single 742 MW powerblock. The second phase was to comprise two more power blocks and was never finished.

50. *Id.* A review of parallel claims in the fall of 2004 indicated that there were approximately ten other international arbitrations pending regarding various claims of the Dahbol parties as well as a host of pending Indian administrative and court proceedings.

51. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Oct. 25, 2004, U.S.-Uru., available at <http://www.state.gov/documents/organization/38051.pdf> [hereinafter U.S.-Uru. Treaty].

roeconomic level, BITs are intended to stimulate investment flows and result in the increase of exports, greater economic development, and economic integration between the two countries.

In the 1980s and 1990s the United States negotiated and signed forty-five BITs, of which thirty-eight are now in force. After a five year hiatus (the last BIT was signed with Bahrain in September 1999), the United States began to reengage potential BIT partners on the basis of a new model BIT. In fact, U.S. Trade Representative Robert Zoellick and Pakistan's Minister of Commerce Humayan Akhtar Kahn announced in September 2004 that the two countries would begin BIT negotiations.

#### A. THE U.S. MODEL BIT'S SUBSTANTIVE OBLIGATIONS

The new United States model BIT,<sup>52</sup> released shortly after the United States-Uruguay BIT was signed, expands on the core principles of the old BITs. In large part, the new model BIT mirrors the investment chapters of recent U.S. free trade agreements (FTAs) and is consistent with the negotiating objectives for investment set out in the 2002 Bipartisan Trade Promotion Authority Act.<sup>53</sup> The following sections summarize the core provisions of the new model BIT.

##### 1. *Definition of "Investment"*

The model BIT defines an investment in broad terms. An investment is an asset that is directly or indirectly controlled by an investor and has characteristics such as the expectation of profit, the assumption of risk by the investor, or the commitment of capital. The model BIT definition of "investment" provides an illustrative list of different types of investments, ranging from tangible property to intellectual property rights to derivatives. The BIT applies generally to a country's measures relating to investors of the other country and their investments in its territory (defined as "covered investments"). A "covered investment" includes investments that exist on the date the BIT enters into force and those that are established, acquired, or expanded thereafter.<sup>54</sup>

##### 2. *The Principle of Non-Discrimination*

Investors may find they or their investments are the subject of discriminatory measures on the part of the host government. The new model BIT, like older BITs, protects the other party's investors and covered investments during the life cycle of the investment, including the pre-establishment phase. Each government commits not to discriminate based on the nationality of the investor. The host government is required to give national treatment and most-favored-nation treatment to investors and covered investments in like circumstances.

##### 3. *Minimum Standard of Treatment ("MST")*

Under the model BIT, each BIT party is obligated to provide "fair and equitable treatment" and "full protection and security" to covered investments.<sup>55</sup> The article on minimum

52. 2004 U.S. Model Bilateral Treaty, available at <http://www.state.gov/documents/organization/38710.pdf> [hereinafter U.S. Model BIT].

53. Bipartisan Trade Promotion Authority Act, 19 U.S.C.A. § 3802(b)(3) (2004).

54. U.S. Model BIT, *supra* note 52.

55. *Id.*

standard of treatment, as elaborated upon in an explanatory annex, provides that treatment must be in accordance with the customary international law standards relating to the protection of economic rights and interests of aliens. "Fair and equitable treatment" encompasses the concept of due process found in the principal legal systems of the world; "full protection and security" requires the host country to provide the level of police protection required under customary international law.<sup>56</sup> This article also states that a breach of another provision of an international agreement or of the BIT does not per se constitute a breach of the MST obligation, which incorporates a section of the 2001 North American Free Trade Agreement (NAFTA) Free Trade Commission interpretation.<sup>57</sup> Governmental measures that both take effect after the BIT enters into force and relate to losses from armed conflict or civil strife must be non-discriminatory. In the event that an investor suffers from losses stemming from the government's requisition or unnecessary destruction of its covered investment, restitution and/or compensation must be paid.

#### 4. *Expropriation and Compensation*

Customary international law recognizes that a country may expropriate property if certain conditions are met. This article follows the customary international law standard, providing that a country may expropriate property if it does so for a public purpose, in a non-discriminatory manner, in accordance with due process of law, and accompanied by prompt, adequate, and effective compensation.

The expropriation article disciplines both direct and indirect expropriation. Direct expropriation occurs when a government actually transfers title or seizes an investment. Indirect expropriation results from a governmental action or series of actions that has an effect equivalent to direct expropriation. Like recent FTAs, the new model BIT contains an expropriation annex that elaborates on certain expropriation concepts. For example, the annex makes clear that expropriation can take place only with respect to a tangible or intangible property interest or right in an investment. In addition, the expropriation annex lists three factors, among others, to be considered in determining whether an indirect expropriation has occurred. These factors, as well as the case by case approach, have been utilized in jurisprudence under the U.S. Constitution's "takings" clause.<sup>58</sup> These factors include: (1) an assessment of the adverse economic impact of the government action, (2) the extent of government interference with reasonable investment-backed expectations, and (3) the character of the government action. The annex also notes that non-discriminatory government regulatory actions designed and applied to protect legitimate public welfare objectives will be considered an indirect expropriation only in rare circumstances.

#### 5. *Transfers*

Some countries maintain capital control laws specifically aimed at retaining foreign currency in their country. The model BIT's transfer obligation requires that a country permit transfers related to a covered investment, both into and out of the country, to be made freely and without delay. For example, a covered investment must be allowed to pay its non-resident investors dividends. Additionally, a country must permit transfers to be made

56. *Id.*

57. See Interpretation of the Free Trade Commission of Certain Chapter 11 Provisions, July 31, 2001, available at <http://www.state.gov/documents/organization/38790.pdf>.

58. See *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 124 (1978).

in a "freely usable currency," as determined by the International Monetary Fund, at the market rate at the time of transfer.<sup>59</sup> The euro, Japanese yen, pound sterling, and the U.S. dollar are currently classified by the International Monetary Fund as "freely usable currencies."<sup>60</sup> Exceptions to the free transfer obligation include the application of certain laws, such as those intended to protect creditors' rights, on an equitable, non-discriminatory, and good faith basis.

#### 6. *Performance Requirements*

In order to obtain certain ancillary benefits from an investment, countries sometimes condition the establishment or operation of the investment on certain performance requirements.<sup>61</sup> For example, in order to increase exports, a country might require that an investor commit to export a given amount of its output as a condition for establishing the investment. Such a performance requirement is prohibited under this article. A more limited subset of performance requirements is also prohibited if imposed in exchange for initial or continued receipt of an advantage, such as a tax holiday. The scope of this article is limited in that only those requirements enumerated are prohibited. But this article also covers all investments in the party's territory, including investments owned or controlled by investors of the host country or by investors of third countries.

#### 7. *Senior Management and Boards of Directors*

A government might try to retain control over foreign investments by requiring that its nationals be appointed to senior management positions or to the board of directors. The BIT prohibits such measures, as they conflict with the investor's ability to control its investment.<sup>62</sup> However, a country may require that a majority of the board of directors be of a particular nationality or that a director be a resident of the host country, so long as the requirement does not materially impair the investor's control over its investment. In each negotiated BIT, annexes of non-conforming measures contain exceptions to each party's obligations with respect to non-discrimination, performance requirements, and senior management and boards of directors.

#### 8. *Publication of Laws and Decisions Respecting Investment*

A country's failure to publish fully its laws and judicial decisions may create a critical problem for investors.<sup>63</sup> This article is aimed at increasing transparency in the legal framework governing investment. Both countries are required to ensure that laws, regulations, procedures, and administrative rulings of general application and adjudicatory decisions that deal with any matter covered by the BIT, are promptly published or made publicly available. The article is subject to both Investor-State and State-to-State dispute settlement.

#### 9. *Transparency in Lawmaking and Administrative Proceedings*

The model BIT also aims to improve transparency in each country's lawmaking procedures and administrative proceedings.<sup>64</sup> The transparency article is subject only to State-

59. U.S. Model BIT, *supra* note 52, at art. 7.

60. International Monetary Fund, *Glossary of Selected Terms: Freely Usable Currency*, available at [http://www.imf.org/external/np/exr/glossary/showTerm.asp?term\\_id=41](http://www.imf.org/external/np/exr/glossary/showTerm.asp?term_id=41) (last visited July 3, 2005).

61. U.S. Model BIT, *supra* note 52, at art. 8.

62. *Id.* at art. 9.

63. *Id.* at art. 10.

64. *Id.* at art. 11.

to-State dispute settlement. Each country must, to the extent possible, publish any measure of general application it proposes to adopt in advance, and provide interested persons and the other government a reasonable opportunity to comment on such measures. Detailed provisions govern administrative proceedings.

## B. THE U.S. MODEL BIT'S INTERNATIONAL ARBITRATION PROVISIONS

### 1. *Access to International Arbitration*

Investors consider that a major benefit of a BIT is the access it provides to binding international arbitration. The model BIT provides for both Investor-State and State-to-State dispute settlement. The Investor-State dispute settlement mechanism allows an investor to bring an arbitral claim against the country where the investment is located.<sup>65</sup> State-to-State dispute settlement applies to disputes between the parties regarding the interpretation or application of the treaty.

An investor may submit a claim to Investor-State arbitration that the host country has breached any of the core treaty obligations discussed above in sections 2-8, an investment authorization, or an investment agreement,<sup>66</sup> provided that the investor has suffered a loss or damage arising out of that breach. The investor may bring the claim on its own behalf, or on behalf of an enterprise in the territory of the other country that the investor owns or controls. Special rules apply to the arbitration, both Investor-State and State-to-State, of disputes involving measures relating to financial services.

The BIT contains detailed procedural requirements for submitting a claim under Investor-State arbitration. A claim may not be submitted to Investor-State arbitration until at least six months have passed since the events giving rise to the claim. The investor must also waive its right to initiate or continue any other dispute settlement procedures with respect to the claim. A claimant may, however, seek interim injunctive relief, not involving the payment of monetary damages, before the host country's courts or administrative tribunals solely to preserve its rights during arbitration.

### 2. *Transparency in Arbitral Proceedings*

The new model BIT makes significant strides towards improving the transparency of arbitration. Most key documents relating to arbitral proceedings must now be made available to the public, subject to certain procedures for protected information. Protected information includes business confidential information or information that is considered privileged or protected by a country's law. Documents that must be publicly accessible include: (1) the notice of intent, (2) the notice of arbitration, (3) pleadings, memorials, briefs; (4) non-disputing Party submissions; (5) amicus curiae submissions, and (6) the arbitral tribunal's awards, orders and decisions. The tribunal must also conduct hearings that are open to the public, subject to logistical arrangements and the protection of confidential information.<sup>67</sup>

65. *Id.* at § B.

66. Compared to prior BITs, the U.S.-Uruguay BIT and the new model BIT have a much more detailed definition of what is covered by an investment agreement.

67. U.S. Model BIT, *supra* note 52, at art. 29.

### 3. *Bilateral Appellate Mechanism*

Like recent FTAs, the model BIT maintains the possibility of establishing in the future a bilateral appellate body or similar mechanism to achieve coherence in arbitral awards. The Bipartisan Trade Promotion Authority Act of 2002 specifically requires that such a mechanism be contemplated for trade agreements,<sup>68</sup> but the concept is also relevant for BITs. The purpose of such a mechanism is to review Investor-State arbitration awards and attempt to ensure consistency in the interpretations of the investment provisions.

## VI. Investor-State Treaty-Based Arbitration

The year 2004 saw substantial activity in both the filing and rendering of decisions in Investor-State treaty-based arbitrations. A total of twenty-seven cases were registered at the World Bank Group's International Centre for the Settlement of Investment Disputes (ICSID) or its Additional Facility during the year, under the Investor-State arbitration provisions of international investment treaties. Still others were filed with other institutions or on an ad hoc basis under the United Nations Commission for International Trade Law (UNCITRAL) Rules. Arbitrations were filed under bilateral investment treaties (BITs), which currently number over 2000, as well as under NAFTA and other multilateral agreements, such as the 1987 ASEAN Agreement for the Promotion and Protection of Investments.<sup>69</sup> Meanwhile, in addition to several awards issued under various BITs and NAFTA, the first award was issued under the Energy Charter Treaty.<sup>70</sup>

### A. JURISDICTIONAL/ADMISSIBILITY DECISIONS

#### 1. *Definition of Investment*

Investor-State arbitral tribunals have continued, for the most part, to permit a wide variety of interests to qualify under the broad definition of investment set forth in the applicable investment agreements. Notably, however, some tribunals have shown that there are limitations to the scope of activities coming under the definition of investment in the BITs and FTAs. In *Tokios Tokelés v. Ukraine*,<sup>71</sup> the claimant was a company incorporated and doing business in Lithuania, 99 percent owned by Ukrainian nationals, with a subsidiary incorporated in Ukraine. Ukraine contended that the Ukraine-Lithuania BIT and the ICSID Convention required the claimant to demonstrate that the capital used in his investment originated from non-Ukrainian sources. The majority of the tribunal found no

68. Bipartisan Trade Promotion Authority Act, 19 U.S.C. § 3802(b)(3)(G)(iv) (2004).

69. See Luke Peterson, *Cement Firm Launches Arbitration Against Indonesia under Contract, ASEAN Treaty*, INVESTMENT LAW & POLICY WEEKLY NEWS BULLETIN, Feb. 6, 2004, available at <http://www.iisd.org/investment/invest-sd/archive.asp>.

70. Nykomb Synergetics Tech. Holding AB, Sweden v. Lat. (2003) (Stockholm Chamber of Comm. Award), available at [http://ita.law.uvic.ca/alphabetical\\_list.htm#mo](http://ita.law.uvic.ca/alphabetical_list.htm#mo); See Summaries of Award in Thomas W. Wälde & Kaj Hobér, *The First Energy Charter Treaty Award*, 1 TRANSNAT'L DISPUTE MGMT. 4 (Oct. 2004), and Jonas Wetterfors, Comment, *The First Investor-State Arbitration Award under the Energy Charter Treaty*, INT'L LEGAL NEWS, Dec. 10, 2004 (Int'l Law. Network, New York, N.Y.) available at [http://www.iln.com/2004\\_newsletter/dec/Nykomb%20v%20Latvia.pdf](http://www.iln.com/2004_newsletter/dec/Nykomb%20v%20Latvia.pdf).

71. *Tokios Tokelés v. Ukr.*, ICSID (W. Bank) ARB/02/18 (2004), available at <http://www.worldbank.org/icsid/cases/tokios-decision.pdf>.

basis in the BIT or the ICSID Convention to infer such a restriction on the source of capital.<sup>72</sup>

In *Joy Mining Machinery Limited v. Egypt*,<sup>73</sup> the tribunal found that a contractor for the provision of mining systems and supporting equipment who challenged an Egyptian government agency's refusal to release bank performance guarantees had no investment under the applicable BIT, between the U.K. and Egypt, or under the ICSID Convention. The tribunal found that the contract was equivalent to one for the sale of goods, even though the contract involved additional activities such as engineering and technical assistance over a ten year period.<sup>74</sup> The tribunal also found it significant that "[n]o reference to investment [was] anywhere made [in the contract] and no steps were taken to qualify it as an investment under the Egyptian mechanisms for the authorization of foreign investments . . .".<sup>75</sup> The tribunal found that the bank guarantee could not be considered a "pledge" or any other kind of "asset" in accordance with article I of the BIT. Rather, it was simply a contingent liability.

In *Nagel v. Czech Republic*,<sup>76</sup> the tribunal found that rights derived from a co-operation agreement between the claimant and a state-owned enterprise to establish a telecommunications business did not constitute an "asset" having financial value, and therefore did not amount to an investment under the Czech-UK BIT. The tribunal found that there was no guarantee that a license would be obtained and encouragement from government officials could not give rise to a "legitimate expectation" with a financial value.<sup>77</sup>

In *PSEG v. Turkey*,<sup>78</sup> the respondent argued that the tribunal lacked jurisdiction over any cognizable investment under the United States-Turkey BIT because the relevant investment had never been approved by the Turkish government. In so arguing, it relied on its notification to the Secretary-General of ICSID on February 23, 1989, after the BIT had been signed but before it entered into force, that "only the disputes arising directly out of investment activities which have obtained necessary permission, in conformity with the relevant legislation of the Republic of Turkey on foreign capital, and that have effectively started shall be subject to the jurisdiction of the Centre."<sup>79</sup> The tribunal rejected this argument, finding that notifications of this type pursuant to Article 25(4) of the ICSID Convention do not constitute, and cannot override, the consent given to arbitration by member States under, e.g., a BIT.

72. A dissent, worthy of note as it was issued by the president of the tribunal, Prosper Weil, found that the majority gave too much weight to the broad definition of investment in the BIT, while failing to restrict its jurisdiction pursuant to the object and purpose of the ICSID Convention to facilitate the international flow of private capital. Professor Weil subsequently resigned from the tribunal. His dissenting opinion is available at <http://www.worldbank.org/icsid/cases/tokios-dissenting-opinion.pdf> (last visited July 9, 2005).

73. *Joy Mining Mach. Ltd v. Egypt*, ICSID (W. Bank) ARB/03/11 (2004), available at <http://www.worldbank.org/icsid/cases/joy-mining-award.pdf>.

74. *Id.* ¶ 55. The tribunal pointed to the fact that the contract price was paid in full in the early stages of the contract as an important reason for considering the duration of this commitment insignificant. *Id.* ¶ 57.

75. *Id.* ¶ 56.

76. *Nagel v. Czech Rep.*, Stockholm Arb. Rep. Case 49/2002 (2003).

77. *Id.* at 164.

78. *PSEG Global Inc. v. Turk.*, ICSID (W. Bank) ARB/02/5 (2004), available at <http://www.asil.org/ilib/psegdecision.pdf>.

79. *Id.* ¶¶ 125-129.

## 2. *Nationality of the Investor*

The nationality of the investor was not a contested issue for the majority of the investor-State cases decided in 2004. However, in two cases where nationality was in dispute, tribunals found a lack of jurisdiction. One issue in *Soufraki v. United Arab Emirates*<sup>80</sup> was whether the claimant was an Italian national for purposes of Article 25(2) of the ICSID Convention and the BIT between Italy and the United Arab Emirates (UAE). The claimant maintained that the UAE itself had recognized the claimant's Italian nationality in entry and residence permits, and Italian authorities had issued him certificates of Italian nationality. He claimed that since Italian nationality is a matter of Italian law, the tribunal was without power to second guess the determinations of the Italian authorities in the absence of fraud. The tribunal supported the argument of the UAE, however, that the tribunal was "the judge of its own competence" under Article 41 of the ICSID Convention.<sup>81</sup> It found, that the claimant lost his Italian nationality in accordance with Italy's nationality laws, automatically upon acquiring Canadian nationality in 1991 (a fact of which the Italian authorities may not have been aware). Accordingly, it dismissed the claim for lack of jurisdiction.

In *Champion Trading Company v. Egypt*,<sup>82</sup> Egypt claimed that the three individual claimants could not invoke the ICSID Convention as they were dual nationals of Egypt and the United States. Although these claimants were born in the United States, their father was Egyptian, and under Egyptian law, a child born of an Egyptian father, either within or outside Egypt, automatically acquires Egyptian nationality at birth. The tribunal rejected the claimants' argument that their nationality was to be determined according to the international law rule of "real and effective nationality."<sup>83</sup> The tribunal instead concluded that it lacked jurisdiction, because the ICSID Convention provided for the explicit exclusion of dual nationals from recourse to ICSID.<sup>84</sup>

## 3. *Standing of Minority Shareholders*

Investors who filed claims in the capacity of minority shareholders had another successful year in fending off challenges to their standing to file claims under BITs and NAFTA, even where the challenged measures directly affected only the companies in which they invested. In *Enron v. Argentina*,<sup>85</sup> the tribunal found that the claimants, who indirectly owned a total of 35.263 percent of a privatized gas distribution network, had standing to allege that tax assessments by Argentine provinces violated the expropriation and the fair and equitable treatment provisions of the United States-Argentine BIT, even though the tax was levied on the network and not on the claimants. It found that because the claimants had been invited by the Argentine government to participate in the privatization of the network and had "certain decision-making power in [its] management . . . , " claimants were more than remotely

80. Hussein Nuaman Soufraki v. U.A.E., ICSID (W. Bank) ARB/02/7 (2004), available at <http://www.transnational-dispute-management.com/welcome.html>. An annulment proceeding was registered at ICSID on November 12, 2004.

81. *Id.*

82. *Champion Trading Co. v. Egypt*, ICSID (W. Bank) ARB/02/9 (2003), available at <http://www.worldbank.org/icsid/cases/champion-decision.pdf>.

83. *Id.* at 16.

84. *Id.* at 16-17.

85. *Enron Corp. v. Arg.*, ICSID (W. Bank) ARB/01/3 (2004), available at <http://www.asil.org/ilib/Enron.pdf>.



connected to the privatization process initiated by Argentina.<sup>86</sup> Thus Argentina must be deemed to have consented to arbitrations for treaty violations that affected the claimants.<sup>87</sup>

In *GAMI v. Mexico*,<sup>88</sup> the tribunal found that GAMI, a U.S. holder of 14.18 percent of a Mexican holding company, GAM (the owner of five sugar mills), had standing to raise its claims of violations of NAFTA's articles on national treatment, minimum standard of treatment, and expropriation after Mexico expropriated the sugar mills. GAMI had an "investment" in Mexico for NAFTA purposes and alleged that its investment was damaged by breaches of NAFTA. The lack of interference by a host state with GAMI's share ownership did not act as a bar to the tribunal's jurisdiction. As the tribunal noted, "the issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment. . . . [This is] a matter to be examined on the merits."<sup>89</sup>

#### 4. Forum Selection Issues from Alleged Breaches of Contracts

Several new decisions addressed continuing issues of treaty jurisdiction over actions alleged to breach contracts, especially when the contract in question contained a forum selection clause that vested exclusive jurisdiction over contract disputes in domestic courts or arbitration tribunals. In *SGS v. Philippines*,<sup>90</sup> the tribunal faced a claim, inter alia, of violation of the umbrella clause of the Swiss-Philippines BIT, arising from a failure of the Philippine government to pay amounts allegedly due under its contract with SGS.<sup>91</sup> The umbrella clause obligated the government to "observe any obligation it has assumed with regard to specific investments in its territory by investors of the other . . . Party," while the investor-state jurisdictional clause broadly covered "disputes with respect to investments."<sup>92</sup> The tribunal found that even though the umbrella clause must be read to provide for BIT jurisdiction over alleged breaches of contract, the BIT nevertheless did not override an exclusive jurisdiction clause contained in the contract, requiring that disputes arising there under be heard in Philippine courts.<sup>93</sup> The tribunal therefore stayed the proceedings pending a determination by the Philippine courts.<sup>94</sup>

86. *Id.* at ¶ 55.

87. *Id.* ¶¶ 55-56. Another tribunal reached a similar result in *LG&E Energy Corp. v. Arg.*, ICSID (W. Bank) ARB/02/01 (2004), available at <http://ita.law.uvic.ca/documents/LGE-DecisiononJurisdiction-English.pdf>.

88. *GAMI Inv., Inc. v. Mex.*, 44 I.L.M. 545 (2005) (Final Award of Nov. 15, 2004).

89. *Id.* ¶ 33. On the merits, however, the tribunal dismissed GAMI's national treatment claim, because GAMI could not prove that Mexico treated GAM differently than other Mexican companies due to GAMI's participation in GAM, and dismissed its expropriation claim because GAM sought and received a partial recovery from the Mexican courts, and GAMI failed to show additional injury inflicted on it under NAFTA over and above GAMI's proportionate share of the damages awarded to GAM. *Id.* ¶¶ 115-28, 132-33.

90. *SGS Societe Generale de Surveillance S.A. v. Phil.*, ICSID (W. Bank) ARB/02/6 (2004), available at <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>.

91. *Id.* at ¶ 92.

92. *Id.* at ¶¶ 115, 131.

93. *Id.* ¶ 154.

94. This decision contrasts with a 2003 decision by another tribunal involving similar issues, in a case brought by the same company against the government of Pakistan under the Swiss-Pakistan BIT. In the first SGS case, the tribunal found that the umbrella clause of that BIT was so broad and far-reaching that it could not generally be interpreted to automatically elevate breaches of contracts to the level of breaches of international treaty obligations. Instead, it only could be applied to contract violations in exceptional circumstances, such as if the government refused to arbitrate under the contractual arbitration clause. *SGS Societe Generale de Surveillance S.A. v. Pak.*, ICSID (W. Bank) ARB/01/13 (2003), available at <http://www.worldbank.org/icsid/cases/SGS-decision.pdf>.

The case of *Salini v. Jordan*<sup>95</sup> involved a breach of contract claim, in which the relevant BIT, between Italy and Jordan, contained an umbrella clause as well as a provision stating that dispute settlement procedures agreed upon between investors and the government in an investment agreement shall be followed by the parties. The tribunal held that because the relevant contract required that disputes be adjudicated in the Jordanian courts, the investment agreement provision in the BIT required that the contractual forum selection clause be honored, notwithstanding the BIT umbrella clause, and that it therefore lacked jurisdiction over the breach of contract claims.

In other cases, tribunals followed prior holdings such as that of the ad hoc committee in the *Vivendi* arbitration<sup>96</sup> and found that contractual forum selection clauses did not divest them of jurisdiction over breaches of substantive provisions of the pertinent treaties, even if the alleged treaty breaches were based on the same facts as the alleged breaches of contract.<sup>97</sup> In one case filed by minority shareholders, the respondent's attempt to challenge the jurisdiction of tribunals based on forum selection clauses of its contracts were unavailing, as the claimant/shareholders were not party to these contracts.<sup>98</sup>

### 5. *Exclusion of Tax Matters*

Two decisions in 2004 dealt with a relatively novel issue in investment treaty jurisprudence—the carve-out in many BITs from coverage of most types of tax matters. Most early U.S. BITs, for example, provide similar variants of the following text:

1. With respect to tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.
2. Nevertheless, the provisions of this Treaty, and in particular [the dispute settlement] Articles . . . , shall apply to matters of taxation only with respect to the following:
  - (a) expropriation, pursuant to Article IV;
  - (b) transfers, pursuant to Article V; or
  - (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VII (1) (a) or (b).<sup>99</sup>

Although such language may appear to plainly exclude taxation matters from the mandatory application of the BITs that are not alleged to be violations of articles IV or V, or a breach of an investment agreement or authorization, the two arbitral tribunals addressing tax matters in 2004 did not so hold. In the decision on jurisdiction in *Enron*, the claimant argued that certain tax assessments, imposed by some Argentine provinces, violated the expropriation and fair and equitable treatment articles under the United States-Argentina

95. *Salini Construttori S.p.A. & Italstrade S.p.A. v. Jordan*, ICSID (W. Bank) ARB 02/13, (2004), available at <http://www.worldbank.org/icsid/cases/awards.htm#award35>.

96. *Compania de Aguas del Aconquija S.A. v. Arg.*, ICSID (W. Bank) ARB/97/3 (2002) (decision by ad hoc annulment committee).

97. *Enron*, ICSID (W. Bank) ARB/01/3, ¶¶ 89-94; *LG&E*, ICSID (W. Bank) ARB/02/01, ¶¶ 61-62; *Siemens A.G. v. Arg.*, ICSID (W. Bank) ARB/02/8, ¶¶ 180-83 (2004), available at <http://www.asil.org/ilib/Siemens-Arentina.pdf>.

98. *LG&E*, ICSID (W. Bank) ARB/02/01 at ¶¶ 58-60.

99. Bilateral Investment Treaty, U.S.-Arg., article XII, available at <http://www.sice.oas.org/bits/usaarge2.asp> (last visited July 3, 2005). More recent U.S. BITs and FTAs do not include a carve-in for the transfers article in the tax article.

BIT.<sup>100</sup> The tribunal had little trouble finding that the expropriation claim was clearly contemplated under the tax article of that BIT, even though the tax measures in question were not imposed on claimants, minority shareholders in the taxed entity TGS. The tribunal went further, however, and found two reasons why it had jurisdiction to decide the fair and equitable treatment claims. First, it noted that the “strive to accord fairness and equity” language in the tax article “is not a meaningless reference.”<sup>101</sup> Second, it stated that “once expropriation is invoked, as indeed it has been, then the connection between [the expropriation] Article . . . and the standards of treatment under Article II(2) of the Treaty becomes operational, including fair and equitable treatment, full protection and security and treatment not less than that required by international law.”<sup>102</sup>

In the *Occidental* case, the tribunal also found that in spite of tax carve-out language in the United States-Ecuador BIT that was substantively identical to that in the Argentina BIT, it had jurisdiction, in addition to the expropriation claim, over claims of violations of national treatment, fair and equitable treatment, and the obligation not to unreasonably impair investments with arbitrary and discriminatory measures.<sup>103</sup> The tribunal first noted that if the treaty was read to confine its application to tax matters to the specific articles mentioned in the tax article, the treaty would have a “quite marginal application . . .” to tax matters—“evidently not what the parties intended in placing an Article of such importance in a Treaty which is brief indeed.”<sup>104</sup> The tribunal also considered it important that, even though *Occidental* did not allege a breach of an investment agreement, the dispute involved the observance of terms of an investment agreement.<sup>105</sup>

## B. INTERPRETATIONS OF SUBSTANTIVE PROVISIONS

### 1. *Expropriation*

Although most decisions on the merits issued in 2004 involved a claim of expropriation, none of these claims succeeded—a trend that has persisted for most expropriation claims in investment treaty arbitrations to date. Tribunals have dismissed claims in which the alleged “expropriation” was the state’s failure to provide a benefit through an alleged breach of a contract or violation of a statute. For example, in *Waste Management v. Mexico*,<sup>106</sup> the alleged failure to enforce exclusivity provisions of a contract, to pay certain invoices, and to provide certain land for a landfill—actions that the tribunal found to breach but not repudiate a contract—did not rise to the level of an expropriation.<sup>107</sup> In *Occidental v. Ecuador*,

100. *Enron*, ICSID (W. Bank) ARB/01/3.

101. *Id.* ¶ 65.

102. *Id.* ¶ 66.

103. *Occidental Exploration & Prod. Co. v. Ecuador* (Final Award in the Matter of an UNCITRAL Arbitration, London Court of International Arbitration) *available at*, <http://www.asil.org/ilib/OEPC-Ecuador.pdf>. This case has been appealed in the English courts.

104. *Id.* ¶ 68.

105. *Id.* ¶¶ 71-73.

106. *Waste Mgmt, Inc. v. Mex.*, ICSID Case No. ARB (AF)/00/3 (2004) (Final Award), *available at* <http://worldbank.com/icsid/cases/awards.htm>.

107. *Id.* ¶¶ 156-75; *See also SGS*, ICSID (W. Bank) ARB/02/6, ¶ 161 (mere non-payment of invoices by the Philippines under a contract did not amount to an expropriation, when there had been no action to repudiate or cancel the debt); *Wälde & Hobér*, *supra* note 70, at 8 (*Nykomb v. Latvia* award denied expropriation claim based on failure to pay contractually agreed tariff).

the expropriation claim from Ecuador's failure to provide VAT refunds, as allegedly required by statute, was held inadmissible because of *Occidental's* failure to show a "deprivation of the use or reasonably expected economic benefit of the investment, let alone measures affecting a significant part of the investment."<sup>108</sup> In *GAMI v. Mexico*, the tribunal found that the claimant's failure to demonstrate what interest had been partially taken, while alleging without basis that Mexican government actions destroyed its entire investment, was a fatal flaw to its expropriation claim.<sup>109</sup>

The claimant's inability to demonstrate that it possessed a property right that was interfered with by the government played a decisive role in *Generation Ukraine v. Ukraine*,<sup>110</sup> as it has had in other contexts.<sup>111</sup> In this case, the claimant alleged that the city of Kyiv rendered its real estate investment valueless by a series of acts of interference with its investment. The tribunal dismissed the claim; however, the tribunal found that no vested property right was interfered with by the government, which could have given the investor a reasonable expectation that could form the basis for an expropriation claim.<sup>112</sup> Despite the growing body of expropriation jurisprudence under investment treaties, it still remains difficult to find a single set of clear rules under which these claims are decided. Nevertheless, as this body of jurisprudence continues to grow, patterns are becoming increasingly discernable.

## 2. Minimum Standard of Treatment

Arbitral tribunals granted investors' claims of denials of the minimum standards of treatment (MST) provisions in two cases under BITs and denied investors' claims for violations of the MST provision under NAFTA in two cases, while providing some valuable exposition of the standards.

In *Occidental v. Ecuador*, the tribunal found that Ecuador's change in its interpretation of its tax law and reversal of its treatment of VAT tax refunds for oil exporters violated the MST obligation.<sup>113</sup> This occurred because "[t]he tax law was changed without providing any clarity about its meaning and extent and the practice and regulations were also inconsistent with such changes."<sup>114</sup> The tribunal followed the holdings in the 2000 *Metalclad* award under NAFTA and the 2003 *Tecmed* award under the Spain-Mexico BIT, which found that parties fail to provide fair and equitable treatment when they do not provide a trans-

108. *Occidental*, *supra* note 103, ¶ 89.

109. *GAMI*, 44 I.L.M. 545, ¶ 133.

110. *Generation Ukr., Inc. v. Ukr.*, ICSID (W. Bank) ARB/00/9 (2003) (Award), available at <http://www.asil.org/ilm/Ukraine.pdf>.

111. For a discussion of property rights issues under prior expropriation cases and writings, as well as in the clarification provided in recent U.S. FTAs, see Gary H. Sampliner, *Arbitration of Expropriation Claims under U.S. Investment Treaties: A Threat to Democracy or the Dog that Didn't Bark*, 18 ICSID REV.—FOREIGN INV. L.J. 1, 14–15, 25–26, 39–42 (2003).

112. *Id.* ¶¶ 8.8, 18.59, 18.82, 20.8, 20.26–27, 22.1. The tribunal also noted that to the extent the claimant could demonstrate that it had vested property rights, it did not demonstrate that the actions of the Kyiv government interfered with the enjoyment of these rights sufficiently to be deemed to have expropriated them, especially absent a showing that it sought correction of the allegedly wrongful acts through local or national authorities. *Id.* ¶¶ 20.30–33, 21.2–3.

113. *Occidental*, *supra* note 103.

114. *Id.* at ¶ 184.

parent and predictable investment environment.<sup>115</sup> In *MTD v. Chile*, a decision under the Chile-Malaysia BIT, the tribunal also adopted the *Tecmed* Tribunal's explanation of the "fair and equitable treatment" standard, as well as specific fair and equitable obligations in other BITs, deemed to be incorporated into Chile's BIT obligations by virtue of the most favored nation (MFN) clause, discussed *infra*.<sup>116</sup>

In *Waste Management v. Mexico*, the tribunal found that the alleged breach of a contract by a Mexican municipality, the failure of a government entity to provide assistance, and the denial of relief by the Mexican courts, whether individually or together, did not violate NAFTA's MST obligation in Article 1105.<sup>117</sup> The tribunal's synthesis of the MST obligation from prior NAFTA cases found that the obligation is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic; is discriminatory and exposes the claimant to sectional or racial prejudice; or involves a lack of due process leading to an outcome which offends judicial propriety.<sup>118</sup> The tribunal noted that even the most important contractual default it found—the city's failure to pay the claimant—was not "wholly arbitrary . . ." or "grossly unfair," in view of the city's good faith efforts to comply, and that "even the persistent non-payment of debts by a municipality is not to be equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is available to the creditor to address the problem."<sup>119</sup>

In *GAMI*, the tribunal followed the standards set forth in *Waste Management* in a regulatory context in dismissing the MST claim, finding that although the Mexican government might not have fully followed its regulations, *GAMI* could "not . . . show anything approaching 'outright and unjustified repudiation' of the relevant regulations."<sup>120</sup>

### 3. National Treatment

In regard to national treatment, the main issue of contention is often whether the foreign investor claimants are *in like situations* with domestic investors who have been better treated.<sup>121</sup> In *GAMI*,<sup>122</sup> the tribunal rejected the investor's claims under NAFTA Article

115. *Metalclad v. Mex.*, ICSID (W. Bank) ARB (AF) 97/1 (2000), 40 I.L.M. 36 (2001); *Tecnicas Medioambientales Tecmed, S.A. v. Mex.*, ICSID (W. Bank) ARB/(AF)/00/2, (2003) (Award), available at <http://www.worldbank.org/icsid/cases/awards.htm#award24>. The Occidental award did not mention that the *Metalclad* holding on the MST claim was set aside by a Canadian court, based on a failure to show that the transparency requirement was based on any precept of international law. *Mex. v. Metalclad Corp.*, 89 B.C.L.R. (3d) 359 (2001), available at [http://www.international-economic-law.org/Metalclad/metalclad\\_judrev.pdf](http://www.international-economic-law.org/Metalclad/metalclad_judrev.pdf).

116. *MTD Equity Sdn. Bhd. v. Chile*, ICSID (W. Bank) ARB/01/7 (2004) (Award), 44 I.L.M. 91 (2005). Unlike the Occidental decision, the MTD Tribunal expressly noted that it was not interpreting the MST under customary international law, which was not incorporated into the relevant Chile-Malaysia BIT. *Id.* ¶ 111.

117. *Waste Mgmt*, ICSID (W. Bank) ARB (AF)/00/3.

118. *Id.* ¶ 98.

119. *Id.* ¶ 115. The tribunal also found that two Mexican court decisions, which denied *Waste Management's* Mexican subsidiary relief because it had produced unstamped photocopies as evidence of the City's debt in one case and had not sought local arbitration pursuant to the contract in the other case, were not a denial of justice because they were neither "evidently arbitrary, unjust or idiosyncratic" nor lacking in procedural due process. *Id.* ¶¶ 129-30.

120. *GAMI*, 44 I.L.M. 545 at ¶ 104.

121. This analysis was pursuant to the limitations of the national treatment obligation in many treaties to investors in like situations or circumstances. See RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 63-64 (1995).

122. *GAMI*, 44 I.L.M. 545 at ¶¶ 114-15.

1102, finding that the claimant had not shown that it was in a like circumstance to those investors whose mills were not expropriated. The tribunal noted that although the Mexican government's financial criteria for determining which mills were running inefficiently may have been flawed, the government's treatment of investors did not differentiate based on the nationality of the investors. In *Occidental v. Ecuador*,<sup>123</sup> the claimant alleged that Ecuador's denial of VAT reimbursement to oil exporters, but not exporters in other sectors, violated the national treatment provision of the Ecuador-United States BIT. The tribunal rejected Ecuador's argument that the comparison should be limited to other oil exporters. It concluded that the phrase *in like situations* "cannot be interpreted in the narrow sense advanced by Ecuador, as the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken."<sup>124</sup> It also noted that the more narrow definition of *like product* as set forth in the GATT/WTO was inapplicable in the investment context.

#### 4. Most Favored Nation Treatment

In the past year, there have been several cases in which the investor has invoked the Most Favored Nation (MFN) clause, both for purposes of obtaining more favorable dispute settlement provisions and more favorable substantive treatment. In *Siemens v. Argentina*,<sup>125</sup> the tribunal held that access to dispute settlement, such as ICSID arbitration, is subject to the MFN clause of the German-Argentine BIT, which applies MFN treatment to investments, as well as activities related to investments, without any further qualification. The tribunal followed the jurisdictional decision in *Maffezini v. Kingdom of Spain*<sup>126</sup> in this regard, based on the similar breadth of the MFN clause in the German-Argentine BIT compared to the clause at issue in *Maffezini*.<sup>127</sup> The claimants in *Salini v. Jordan*<sup>128</sup> had less success in invoking the applicable MFN provisions than the claimants in *Maffezini* and *Siemens*. They attempted to bypass the Italy-Jordan BIT's provision excluding contractual disputes from ICSID arbitration by relying on other BITs entered into by Jordan without such a limitation. The tribunal found that the common intent of the parties to exclude contractual disputes from ICSID jurisdiction in the Italy-Jordan BIT was clear. It further found that there was no intention to make the MFN clause in that Italy-Jordan BIT apply to dispute settlement. Finally, in *MTD v. Chile*,<sup>129</sup> the claimants invoked the MFN clause of the Chile-Malaysia BIT in order to obtain fair and equitable treatment protection that

123. *Occidental*, 43 I.L.M. 1248.

124. In *Nykomb v. Latvia*, involving a comparison of investors in the same sector, the tribunal found a national treatment violation when the respondent was unable to demonstrate any nondiscriminatory and legally authorized criteria it used in failing to pay equivalent tariffs to the claimant's power plant as it paid to certain other domestically owned power plants. See Wälde & Hobér, *supra* note 70.

125. *Siemens*, ICSID (W. Bank) ARB/02/08.

126. *Maffezini v. Spain*, ICSID (W. Bank) ARB/97/7 (2000), 16 ICSID REV.—FOREIGN INV. L.J. 212 (2001), available at [http://www.worldbank.org/icsid/cases/emilio\\_DecisiononJurisdiction.pdf](http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf). The *Maffezini* holding that investors under one BIT could take advantage of more favorable dispute resolution clauses of a different BIT of the respondent under the applicable MFN clause has become well-known in investor-state arbitration circles.

127. *Siemens*, ICSID (W. Bank) ARB/02/08 at 109.

128. *Salini*, ICSID (W. Bank) ARB 02/13 at ¶¶ 116-118.

129. *MTD Equity*, ICSID (W. Bank) ARB 02/13 at ¶¶ 100-104.

encompassed standards from other BITs concluded by Chile.<sup>130</sup> The tribunal noted that because the MFN clause of the Chile-Malaysia BIT had made specific exclusions for other areas such as tax matters, but not any exclusion regarding fair and equitable treatment, it would fulfill the objectives of the Chile-Malaysia BIT to allow the investor to seek protections of fair and equitable treatment standards from other Chilean BITs.<sup>131</sup>

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130. These included an obligation under article 3(1) of the Chile-Denmark BIT to “observe any obligation it may have entered into” with respect to investments of nationals of the other party and under article 3 of the Chile-Croatia BIT not to impair the use or enjoyment of investments by unreasonable or discriminatory measures and to “grant the necessary permits in accordance with its laws and regulations” to investments admitted into each party’s territory. *Id.* ¶ 197.

131. *Id.*

